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LONNIE JOE CARTER,

PETITIONER,

v.

COMMONWEALTH OF KENTUCKY,

RESPONDENT,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

REPLY BRIEF FOR PETITIONER

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ARGUMENTS

I.

THE RECORD AFFIRMATIVELY REFLECTS, AND RESPONDENT ADMITTED BELOW, THAT PETITIONER DECLINED TO TESTIFY DUE TO FEAR OF IMPEACHMENT BY THE USE OF PRIOR FELONY CONVICTIONS.

Kentucky attacks Carter's assertion that he declined to testify for a reason unrelated to guilt or innocence [Brief for Respondent, hereinafter BR, 25-26]. "It is apparent that petitioner did not testify simply because he could not explain to the jury his incriminating statements and...[other circumstances]"[BR, 26]. Perhaps this belated argument can be best met by quoting from Respondent's Brief in the Supreme Court of Kentucky [hereinafter AGB], where the Attorney General stated, in pertinent part:

> ...an extensive hearing was held in-chambers to discuss whether or not the appellant would testify...the Commonwealth indicated its intention to impeach the appellant through the use of his three most recent felony convictions. Faced with this dilemma, the appellant, with the advice and consent of counsel, chose not to take the stand. [AGB, 6; emphasis added.]

In the context of a related argument below,[1] respondent stated:

> It is true that the Commonwealth indicated to the appellant in closed chambers its intention to impeach him with these prior felony convictions if he took the stand. The knowledge of this fact most definitely influenced the appellant in his decision not to take the stand.... [AGB, 9; emphasis added.]

Respondent's main thrust is that since trial counsel did not specifically object to impeachment by the use of the prior felonies in issue during the recidivist trial, this indicates that Carter was not actually concerned with this possibility (and actually declined to testify solely because he had nothing to say). This argument overlooks several crucial points. First, whether petitioner was specifically concerned with use of the enhancement felonies is not of central importance to this case. It is not denied that both trial counsel and Carter were very worried regarding the effect on the jury of impeachment by prior felony convictions in general regardless of which the prosecution decided to use.[2]

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[1] Carter argued that it was a denial of due process of law under the Fourteenth Amendment for the trial court to refuse to exercise its statutory discretion to impanel a second jury for the recidivist hearing since impeachment by the prior felonies in issue during the persistent felon phase was threatened during the trial of the triggering offense . KRS 532.080(1). [Carter's Brief in Kentucky Supreme Court, hereinafter CB, Issue V, 17-18].

[2] "Hon. W.E. ROGERS, III: Judge, I think possibly the only reservation Mr. Carter might have about testifying would be his impeachment by the use of these previous offenses... [It is] a heavy thing...I think juries take it very seriously..." [A, 54,55].

Therefore, petitioner's essential point remains: Carter declined to testify for a reason unrelated to guilt or innocence.

Second, while trial counsel did not specifically address himself to the use of the enhancement felonies for impeachment,[3] this was unnecessary since the trial judge considered and satisfied himself of the propriety of the use of these convictions.[4] More importantly, it was Mr. Carter himself who expressed concern regarding impeachment by use of the enhancement felonies by inquiring of the trial judge whether he was going to permit this.[5]

Finally, respondent places great reliance upon trial counsel's admission during closing argument in the recidivist trial that the two previous felonies couldn't be contested. Counsel argued for "mercy" [TE, 139]. Respondent claims this reveals that Carter's fear of impeachment was a "red herring" and not actually the motivation for his failure to testify [BR, 26]. Once again, this argument overlooks the crucial fact that Carter properly insisted that Kentucky shoulder the burden of proving the existence of his prior felony convictions. Respondent fails to appreciate the importance of petitioner's reliance upon his constitutional right not to incriminate himself. Had Carter been forced to admit his prior felony convictions during cross-examination in the trial of the burglary charge, he would have waived his valuable Fifth Amendment right as to the recidivist trial.[6] The fact that trial counsel later determined that the prosecution had proven the felonies in issue and felt obligated to argue for "mercy" is of no relevance to the

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[3]Under Kentucky law, an objection was pointless since impeachment during the guilt phase is permissible even by the prior felony convictions in issue during the recidivist portion of the trial. Brown v. Commonwealth, 551 S.W.2d 557, 559-560 (Ky. 1977). See discussion in Brief for Petitioner [hereinafter BP, 36 n. 28]. Furthermore, since the Kentucky Supreme Court reached and disposed of Carter's complaint in this regard, reaffirming Brown, it is clear that petitioner did not "waive" this issue in the trial court as argued by respondent [A, 78-79].

[4]"THE COURT: Well, there's no rule that I know of that prohibits using those" [A, 57].

[5]"LONNIE JOE CARTER: Are you saying the most recent convictions? THE COURT: Well, they are the ones he plans to use. Now, do you understand what you are charged with? LONNIE JOE CARTER: Yes, sir." [A, 58.]

[6]Conviction as a persistent felon or habitual criminal in Kentucky, as noted in petitioner's initial brief, is not "automatic" [BP, 37 n. 30]. A relatively large number of recidivist convictions have been reversed for failure to prove elements of the offense. In addition to those cited previously, see Newton v. Commonwealth, 558 S.W.2d 167, 168 (Ky. 1977); Martin v. Commonwealth, 571 S.W.2d 613, 615 (Ky. 1978). The jury is always free to disregard the Commonwealth's proof. See Lynch v. Commonwealth, 472 S.W.2d 263, 266 (Ky. 1977). "[N]o matter how well [the prior felonies] ...have been prove[n] it is still the jury's prerogative to disbelieve any or all of them." Satterly v. Commonwealth, 437 S.W.2d 929, 930 (Ky. 1969).

issue before this Court. The Commonwealth was properly required to sustain its burden of proof[7] and trial counsel's decision to concede the existence of the prior felonies at that point does not demonstrate that Carter's initial refusal to waive his Fifth Amendment right as to the recidivist charge was either bogus or foolish. Cf. Mullaney v. Wilbur, 421 U.S. 684 (1975).

II.

THE CONSTITUTIONAL VIOLATION IN ISSUE IS NOT SUSCEPTIBLE TO A HARMLESS ERROR ANAYLSIS AND WAS NOT HARMLESS BEYOND A REASONABLE DOUBT. ALTERNATIVELY, RESPONDENT'S CLAIM WAS NOT PRESENTED BELOW AND SHOULD NOT BE CONSIDERED INITIALLY BY THIS COURT.

A. Refusal of a "no inference" instruction can never be harmless error under the Chapman test.

Accepting for sake of argument the constitutional violation complained of, respondent contends that the error was "harmless beyond a reasonable doubt" because the evidence of Carter's guilt was "overwhelming and could not be explained" [BR, 24-25]. Because of the fundamental nature of the right at stake, Carter submits that refusal of the protective instruction requested can never constitute harmless error.

The federal harmless error rule, presently 28 U.S.C. § 2111 (1959),[8] was, in addition to the "no inference" instruction, also in issue in Bruno v. United States, 308 U.S. 287 (1939). This Court noted that the harmless error rule was designed to eliminate reversal based upon "mere etiquette of trials and the formalities and minutiae of procedure..." 308 U.S. at 294. "Of a very different order of importance is the right of an accused to insist on...[the "no inference" instruction]." Id. Bruno stands for the proposition that, at least as a matter of federal criminal procedure, refusal to give the protective instruction cannot be harmless error.

Of course, a different, and more stringent, harmless error test applies to violations of the United States Constitution. Chapman v. California, 386 U.S. 18, 22 (1967), recognized that "there may be some constitutional errors which in

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[7] Actually, although trial counsel did not raise the issue in the trial court, the prosecution failed to prove the date the prior felonies were committed. This fact was necessary to sustain proof of an element of the offense that Carter "was over the age of eighteen (18) at the time the offense [prior felony] was committed." KRS 532.080(3)(b)[CB, 24-25; A, 84].

[8] The statute relied upon by the prosecution in Bruno, 28 U.S.C. § 391 (1928), required disregarding "technical errors, defects...which do not affect the substantial rights of the parties."

the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Conversely, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error..." 386 U.S. at 23 (footnote omitted). Chapman held that prosecutorial comment on the defendant's failure to testify was a constitutional error which could be harmless. However, a strict test was constructed to prevent "unfair and mischievous" results from harmless error analysis. 386 U.S. at 22. The burden was placed upon the prosecution to demonstrate that the error "was harmless beyond a reasonable doubt." 386 U.S. at 24. Since a more stringent harmless error analysis applies to violations of constitutional magnitude, and since refusal of the "no inference" instruction is never harmless under federal procedure, it follows, a fortiori, that the same error cannot be held "harmless" under a constitutional analysis.

In Harrington v. California, 395 U.S. 250, 254 (1969), this Court had the occasion to apply the Chapman standard. It was stated:

> We admonished in Chapman...against giving too much emphasis to "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless (emphasis added).

Since in Bruno, 308 U.S. at 293, a unanimous Court held that refusal of a "no inference" instruction does "affect the substantial rights" of the defendant, it follow, again a fortiori, that the constitutional violation in issue is not susceptible to a Chapman harmless error analysis.

Refusal to instruct upon a fundamental constitutional principle is exactly the type of situation which should be beyond the reach of the harmless error rule. It is petitioner's contention that refusal of the prophylactic instruction tended to strip away the presumption of innocence, shift the burden of proof to the defendant and thereby dilute the reasonable doubt standard. Carter fears that the jury focused solely upon his failure to explain the admittedly incriminating circumstances instead of examining the Commonwealth's evidence to determine whether the prosecution had met its burden as to each element of the offense [BP, 37-43]. "Here, the truth-finding function of the jury was invaded and the State's burden of proving guilt beyond a reasonable doubt was diminished... When the reasonable doubt standard has been thus compromised...such an error so conflicts with an accused's right to a fair trial that the infraction 'can never be treated as harmless error.'" Cupp v. Naughten, 414 U.S. 141, 145 (1973)(dissenting opinion), quoting Chapman, 386 U.S. at 23.

As a practical matter, the claimed constitutional violation would not easily submit itself to harmless error analysis.[9] In order to ascertain the degree of prejudice, the appellate court must speculate on the degree of influence the defendant's failure to testify had in the context of the jury deliberations, a difficult task at best. As with the right to counsel, the right to decline to testify "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice..." Chapman, 386 U.S. at 43 (Stewart, J., concurring), quoting Glasser v. United States, 315 U.S. 60, 76 (1941). A prophylactic approach is called for. See, e.g., Davis v. Alaska, 415 U.S. 308, 318 (1974); Tumey v. Ohio, 273 U.S. 510, 535 (1927). State courts have so held. See People v. Britt, 43 N.Y.2d 111, 371 N.E.2d 504, 505 (1977); Perry v. State, 368 So.2d 310,312 (Ala. 1979).

This Court has apparently held that substantial instructional errors, even those that are not of constitutional magnitude, are not to be excused by invocation of the harmless error doctrine. In Bollenbach v. United States, 326 U.S. 607 (1945), this Court dealt with an erroneous instruction regarding a presumption and rejected the Government's contention that the harmless error rule precluded reversal. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." 326 U.S. at 613. Relying on Bruno, this Court stated:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. 326 U.S. at 615.

In United Brotherhood v. United States, 330 U.S. 395, 408 (1946), it was held that the defendant had been entitled to an instruction correctly stating its liability for certain conduct "[n]o matter how strong the evidence may be...." Again relying on Bruno, this Court refused to apply the harmless error rule.

> The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable doubt instruction. It could not be said that the failure was harmless error. 330 U.S. at 410 (footnote omitted).

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[9] An additional practical problem is that in many, if not most cases, the prosecution's proof will be largely or wholly uncontradicted, since in order to raise the issue realistically the defendant must decline to testify. [See reply argument IV.] This raises the possibility that application of the harmless error rule would eviscerate the claimed constitutional right.

See also Weiler v. United States, 323 U.S. 606, 611 (1944). Carter submits that the constitutional violation in issue can never be harmless error.

B. Refusal of the "no inference" instruction at petitioner's trial was not harmless beyond a reasonable doubt.

Carter disagrees with the respondent's contention that the evidence of his guilt was "overwhelming" and that any error was "harmless beyond a reasonable doubt" [BR, 24-25]. The Commonwealth's conclusory statement of facts [BR 1-9, 24-25] omits reference to points which may shed some doubt on the Commonwealth's case. For example, Officer Davis lost sight of the person he was chasing twice before apprehending petitioner [A, 37-38]. Officer Ellison did not state that the perpetrator "wore rather distinctive looking clothing" [BR, 4]. Ellison did testify that Carter "appeared to be wearing the same clothing as the man she saw running" [A, 22]. Petitioner will rest upon the facts as stated previously [BP, 1-12].

Without a doubt, the prosecution presented sufficient evidence to carry its burden of proof on the burglary charge. However, in the absence of positive eyewitness testimony by Officer Ellison or other iron-clad proof that petitioner was the man seen in the alley, the evidence cannot be considered overwhelming as defined in Harrington. Indeed, the evidence in the present case pales in contrast to that presented in Harrington. The present case is more akin to Chapman where this Court had "no doubt that the error...was not harmless..." 386 U.S. at 24.

Respondent places great emphasis on petitioner's "statement" as pointing "conclusively to his guilt" [BR, 24]. First of all, although certainly an admission, Carter's statement to the police was not a confession. More importantly, Carter argued to the Supreme Court of Kentucky that the statement was solely the product of the police refusal to "scrupulously honor" his decision to remain silent during interrogation. See Michigan v. Mosley, 423 U.S. 96, 103-104 (1975). Despite an objection by trial counsel at the first reference to petitioner's statement during trial [TE, 20], the Kentucky Supreme Court held this allegation of federal constitutional error inadequately presented to the trial court [A, 75]. Carter could, of course, still pursue in federal court his claim of constitutional error by demonstrating "cause" and "prejudice" for trial counsel's alleged procedural default. See Wainwright v. Sykes, 433 U.S. 72 (1977).

The Commonwealth should not be permitted to benefit from the admission at trial of the illegally obtained statement, particularly since the police officers' testimony about the interrogation procedure and petitioner's refusal to cooperate are substantial factors contributing to the necessity for the prophylactic instruction on petitioner's silence at trial. Carter submits his admission should be

disregarded in determining whether the refusal to give a "no inference" instruction was harmless. In essence, the statement is the equivalent of the constitutionally tainted evidence which cannot be considered under the Chapman-Harrington test.

Finally, respondent makes passing mention of Kentucky v. Whorton, 441 U.S. 786 (1979). It is obvious that the present case compares favorably with Whorton, where there were "numerous eyewitnesses" as well as much physical evidence conclusively establishing guilt. 441 U.S. at 787. In fact, evidence introduced below may not be as persuasive as that in Taylor v. Kentucky, 436 U.S. 478 (1978), where an eyewitness, who had known the defendant for several years, testified unequivocally that the defendant had robbed him. 436 U.S. at 480. Considering the "totality of the circumstances" of Carter's trial, neither a Chapman-Harrington analysis nor a Whorton analysis should preclude reversal.

C. Respondent's harmless error claim was not presented below and should not be considered by this Court as an initial matter.

An examination of the Commonwealth's brief in the Kentucky Supreme Court demonstrates that no argument was presented that the failure to give the "no inference" instruction was harmless error—under either state or federal standards [AGB, 6-9]. In Sandstrom v. Montana, 442 U.S. 510 (1979), this Court held that a state court instruction requiring a presumption regarding intent was unconstitutional as violative of the Fourteenth Amendment. Montana argued that any error was harmless under Chapman. Since the harmless error claim had never been considered by the Supreme Court of Montana, this Court declined "to reach...[the issue] as an initial matter..." 442 U.S. at 527. As a general rule, this Court will not consider contentions not presented below. See, e.g., Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); Jenkins v. Anderson, ___ U.S. ___, 100 S.Ct. 2124, 2127 n.1 (1980); Anderson v. Charles, ___ U.S. ___, 100 S.Ct. 2180, 2181 n.1 (1980).

There is good reason for this rule. For example, Kentucky's unique procedure of jury sentencing must be accounted for in any harmless error analysis. In Abernathy v. Commonwealth, 439 S.W.2d 949, 953 (Ky. 1969), the Kentucky Supreme Court described the ingredients in a harmless error analysis under Kentucky procedure:

> Necessarily, one important circumstance in determining whether a particular error was prejudicial is the weight of the evidence. Another is the amount of punishment fixed by the verdict, especially with regard to the allowable minimum and maximum (emphasis added).

See also Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976). In the present case, respondent should be required to first present its claim of harmless error to the Kentucky Supreme Court.

III.

KENTUCKY HAS FAILED TO ARTICULATE ANY CONSISTENT OR SUBSTANTIAL STATE INTEREST IN PRECLUDING A "NO INFERENCE" INSTRUCTION.

Respondent repeatedly insists that the Kentucky courts have consistently held that a "no inference" instruction is contrary to the accused's best interests [BR 9, 16-17]. That simply is not so. As recently as 1971 the Kentucky Supreme Court stated that a non-testifying defendant was entitled to a "no inference" instruction to implement KRS 421.225. Spencer v. Commonwealth, 467 S.W.2d 128, 131 (Ky. 1971). The court relied on its prior decisions from 1945 and 1963 espousing the same position. The Kentucky courts' present position absolutely prohibiting the prophylactic instruction represents a recent reversal of policy. Clearly no consistent state policy is involved.

Significantly, the only rationale advanced by the Kentucky courts for prohibiting an instruction on the defendant's failure to testify is protection of the defendant. Respondent indicates that what is at issue here is Kentucky's "notion of what will best further its own security in the administration of criminal justice...," citing Cupp v. Naughten, 414 U.S. 141, 149 (1973)[BR, 16]. Since the only articulated rationale for Ketucky's position concerns petitioner's rights, this case does not present a "basic...exercise of...jurisdiction" which must be given due respect. Id.

Frankly, this Court should strictly scrutinize the Commonwealth's position since the only justification offered for forbidding the prophylactic instruction is protection of the defendant's rights. Both this Court and the Kentucky Supreme Court have recognized the protective nature of the "no inference" instruction. Lakeside v. Oregon, 435 U.S. 333, 340 (1978); Spencer v. Commonwealth, 467 S.W.2d at 131. Respondent's simultaneous reliance upon Lakeside and Kentucky's policy that the tendered instruction is harmful to the

criminal defendant turns reality on its head.[10]

States are not "free to formulate their own rules to protect their citizens in criminal court proceedings" [BR, 10-11] if those rules in fact harm rather than protect the citizens. The Fifth Amendment privilege against self-incrimination is a specific constitutional right jealously protected by this Court. Respondent's contention that "there should be no question but what the means that are chosen [to protect that right] are reserved to the state" [BR, 22] disregards the fundamental nature of the right at stake. This Court has not hesitated to require the states to adhere to federal constitutional standards in protecting the Fifth Amendment privilege. Griffin v. California, 380 U.S. 609 (1965). It should not hesitate to do so in this case.

IV.

PETITIONER'S DECISION TO RELY UPON HIS RIGHT NOT TO TESTIFY DOES NOT MAKE "IRRELEVANT" HIS ALLEGATION THAT THE FIFTH AMENDMENT WAS VIOLATED.

Respondent urges that "since petitioner failed to take the stand and testify, his discussion of coercion is irrelevant to this case" [BR, 21]. Apparently,[11] the Commonwealth is relying on the reasoning of the dissenting justices in Brooks v. Tennessee, 406 U.S. 605, 613 (1972) and New Jersey v. Portash, 440 U.S. 450, 463 (1979). That reliance is obviously misplaced.

Both Brooks and Portash involved penalties that would actually be exacted only if the defendant testified.[12] Neither defendant testified. The majority in each case accepted that a penalty on the defendant's right not to

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[10] Likewise, petitioner strongly disputes respondent's contention that "[b]oth the court and the prosecuting attorney took great pains to insure that petitioner's Fourteenth as well as his Fifth Amendment rights were protected" [BR, 28]. Respondent overlooks the numerous instances of error, often federal constitutional in nature, which occurred at Carter's trial [See discussion, BP, 12 n. 6]. The refusal of the police to honor Carter's decision to remain silent at the time of his arrest and extensive reference during trial to his initial refusal to say anything are obvious from the record. See Miranda v. Arizona, 384 U.S. 436, 469, 473-474 (1966). The prosecution misled petitioner until the day of trial by indicating in discovery proceedings that Mr. Carter had made no statements [CB, 1, 18-19]. Even a burden of proof instruction was refused [CB, 21-22]. Carter's numerous allegations of error on appeal were rejected, for the most part, not because they were meritless, but because they had not been presented below. Petitioner's trial was hardly one where "great pains" were taken to protect his rights.

[11] The Commonwealth cited no authority for its position.

[12] In Brooks the defendant was required to testify first or not at all. Thus if he chose to testify he was penalized by being forced to do so at a time when he could not know whether his testimony would be helpful or necessary. In Portash the defendant was subject to impeachment by his immunized testimony if he testified. By choosing to testify he risked forfeiting the right not to incriminate himself with his prior statements.

testify was imposed anyway because a constitutionally invalid rule of law impermissibly determined the defendant's decision not to testify. The dissenters in both cases contended that because the defendant did not testify no penalty was exacted. Their apparent concern was the lack of any concrete controversy because the court's advance ruling on what would happen if the defendant did testify was merely "hypothetical" since he did not testify. Portash, 440 U.S. at 466.

Contrastingly, both Carter's case and Griffin v. California, supra, involve penalties that are exacted only if the defendant does not testify. In Griffin the penalty for failing to testify was adverse comment by the prosecutor. The penalty in petitioner's case is unchecked speculation by the jurors about the reasons why petitioner declined to take the stand. Petitioner did not testify, and he requested a "no inference" instruction which was refused. No "hypothetical ruling" is involved. There is a concrete controversy. Petitioner's decision to rely upon his Fifth Amendment right not to testify does not make his penalty claim "irrelevant" [BR, 21]. In fact, the exercise of the privilege makes the claim real. The only similarity between Brooks, Portash and the present case is the fact that the defendants did not testify. In other respects the factual situations are very different. Respondent's contention should be rejected by this Court.

V.

NOTHING IN THE TRIAL COURT'S INSTRUCTIONS CONVEYED THE SUBSTANCE OF THE REJECTED PROPHYLACTIC CHARGE.

Respondent argues that the trial court's presumption of innocence instruction which required the jurors to find petitioner not guilty unless satisfied "from the evidence alone, and beyond a reasonable doubt, that he is guilty" [A, 8] was so similar to the "no inference" instruction requested by petitioner that "[i]n substance therefore petitioner received the instruction he was seeking" [BR, 20]. Respondent's argument is imaginative but neither logical nor persuasive.

Carter requested the trial court to inform the jurors that he is "not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way" [A, 5]. The Commonwealth reasons that the jurors knew that they were forbidden to consider the fact that petitioner did not testify because they were instructed to determine guilt "from the evidence alone" and failure to testify is not evidence [BR, 19-20].

Respondent's argument is highly technical, legalistic and unpersuasive when the realities of a jury trial are considered. Jurors are not lawyers. They do not know the precise definition of "evidence." The notion that they will conclude

simply from being told to consider the evidence alone that they must not consider the defendant's failure to testify is simply not reasonable. That conclusion requires interpreting a general statement in a specific, legalistic way. The minds of jurors simply do not function in this manner. Furthermore, the Commonwealth's argument begs the question. Carter sought an instruction that would prevent his failure to testify from being used as evidence of guilt. Nothing in the presumption of innocence instruction defined "evidence" to exclude Carter's failure to testify. Therefore, it had no substitute curative effect.

An instruction which specificially directed the jurors' attention to the ramifications of petitioner's not testifying was essential. Nothing in the court's abbreviated charge to the jury conveyed the substance of the instruction proposed by petitioner [BP, 39-43]. See United States v. English, 409 F.2d 200 (3rd Cir. 1969), where the Third Circuit Court of Appeals emphasized that "although the district court's instructions fully and fairly advise the jury of the presumption of innocence" the absence of a "no inference" instruction "impermissibly left the jury free to speculate on the effect of the defendant's silence." Id. at 201. Likewise, in petitioner's case the jurors were permitted to speculate about petitioner's failure to testify because they were not forbidden to do so by the court's instructions.

Jurors do notice a defendant's failure to testify [BP, 27]. Particularly in a trial such as petitioner's where his silence was repeatedly emphasized to the jury, the absence of a "no inference" instruction penalizes the exercise of the Fifth Amendment privilege and deprives the accused of a fair trial.

CONCLUSION

For the reasons stated above and in petitioner's original brief, Lonnie Joe Carter respectfully requests this Court to reverse the decision of the Supreme Court of Kentucky affirming his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Michael McNally, counsel for petitioner, hereby certify that the foregoing Reply Brief for Petitioner was served on respondent by personally mailing three copies each of the same to counsel for respondent, HONORABLE ROBERT V. BULLOCK, Assistant Attorney General, at his office, Capitol Building, Frankfort, Kentucky 40601, this 2nd day of January, 1981.

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